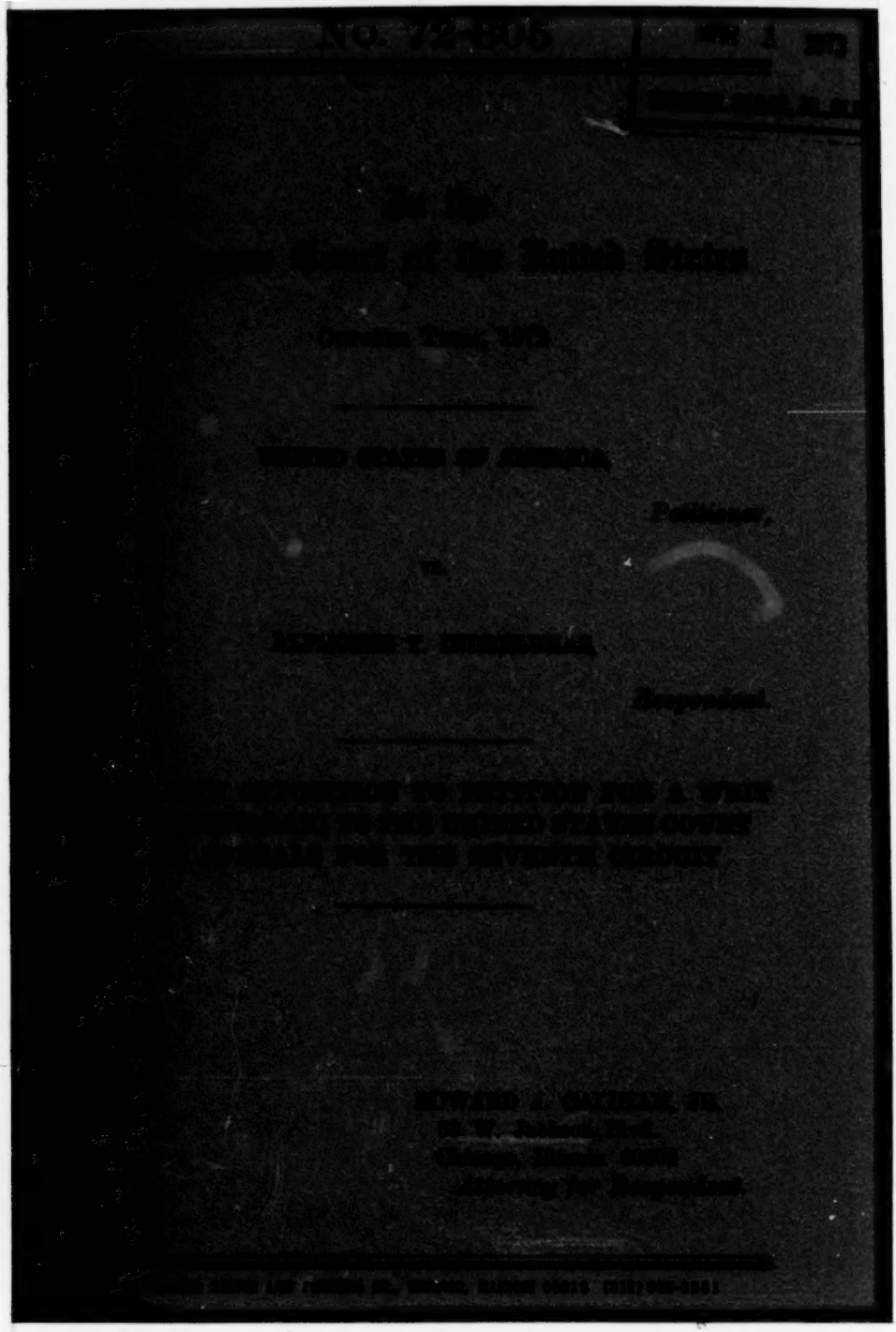

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-805

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALPHONSE T. INDRELUNAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

We think the government Statement very — maybe unintentionally — but very misleading in several respects. The presence of Harry Foiles on this Petition is important in one respect, and in one respect only, and that is so far as the government action in respect to him reflects the understanding of the parties.

We consider it of eminent importance that it was the government which insisted upon a jury trial in this case. The Court, as a matter of practicality, may recognize that

counsel for Foiles and for Indrelunas did not ask for jury trial, since the earning abilities of the plaintiff and the third party defendant did not justify the employment of independent counsel for the expanded time necessarily resulting from trying a case before a jury rather than the bench. A tacit agreement was reached that the government's jury demand would be abandoned. Thus the parties proceeded to the eve or day of trial, when "Washington" elected it would persist in its initial jury demand, a surprise to the court as well as to the tax payer parties. Despite this background, it was the government position on appeal that the jury did not have the right to find the tax payer parties not liable. The basis for this inconsistent position was not that the Court did not instruct correctly — but that it didn't instruct in favor of the government redundantly and argumentatively.

Now the government seeks to get a bonus from bare record to contort it into an implication that it did not, in fact, wait almost two years to take an unfair advantage of a clerical error. To minimize the time factor it argues:

> At the time of the verdict, there was no agreement among the parties as to the amount of money to be refunded to Foiles. More than fourteen months later, after the parties agreed upon the amount of refund due to Foiles, a "stipulation of damages" (specifying the amount of refund) was filed on May 14, 1970. (p. 5)

Thus it argues despite the clear understanding of the parties, as well as the trial judge. See Memorandum Opinion:

> This case was tried before a jury on the sole issue of liability on March 18, 1969, the amount in controversy having been stipulated by the parties. (p. 13)

And so it was! The taxpayer parties having agreed that the government computation — whatever it was — would be accepted, since the taxpayers were without records, they consented that the government would compute the damages, whatever the determination of the jury on the subject of liability. The trial judge, and the jury, were no determiners on the issue of damage, whatever the outcome on the liability issue. Thus, the Court will note that the Stipulation of Damage was merely entered as a memorandum of that earlier agreement, and no Court order was entered — nor was one necessary to be — entered thereon.

The understanding of the parties, the understanding of the trial judge, are reflected in the further understanding of the Court of Appeals.

> Said verdict, which was in reference to liability only, the amount in controversy having been stipulated by the parties, was rendered on March 21, 1969. (p. 17)

Further, the Solicitor's position that the Court of Appeals decided, without equivocation, that the "separate document" requirement of Rule 58 was meant to apply only to clause (2) and never to clause (1) does violence to the well-considered opinion of that Court. After noting the government did not make its motion for the "separate document" judgment until eight months after it filed its initial Notice of Appeal (which it abandoned), that Court continued:

> This Notice [of Appeal], filed some eight months prior to the February motion for entry of judgment, indicates to this court that the government believed the case to be ripe for appeal following the District Court's directive that entry of judgment be made and

> there be judgment on the verdicts as so entered. In this case there was nothing left to be done by the court and everyone involved so understood the judgment to be final. It would, therefore, be somewhat absurd to hold that although all the parties involved understood the case to be at an end, the time limits for appeal would not begin to run until some undetermined point in the future when a formal document was included in the file. In our opinion, the crucial element is that the parties understood the original decision to be final. This understanding, together with the entry of judgment on the docket, considered in context with the foregoing interpretation of the present Rule 58, Fed. R. Civ. P., lead us to the conclusion that the government's appeal in this case is untimely. A holding to the contrary would, in our opinion, allow undue advantage to be taken of a revision in Rule 58 which was intended to clarify and speed-up the entry of judgment, not provide an avenue for prolonging litigation. (pp. 25-26)

What the Court said, in fact, was that the Court and the parties — all parties — believed the Clerk to have performed his purely ministerial duty, which — as will happen in the course of human affairs — he overlooked. Such clerical omission should not be a boon to the unsuccessful, belatedly unhappy litigant, when he cannot profess that clerical omission reacted to his prejudice. For if the government is prejudiced, it must profess that someone was advantaged. It cannot point to that someone.

REASONS FOR DENYING THE WRIT

The government proposes to this Court in a terse paragraph, on which we commend it as a model of economy of language, several suggestions on why it should grant its writ:

> "The decision below is [1] in conflict with decisions of the Third and Fifth Circuits, and [2] is inconsistent with the clear language of Rule 58 of the Federal Rules of Civil Procedure, and [3] the Notes of the Advisory Committee on Rules which explain the purpose of the 1963 amendment to that Rule. [4] The question raised is of continuing importance to all civil litigants in the federal courts within the Seventh Circuit." (Enumeration ours.)

1. In this suggestion that the 7th Circuit decision conflicts with other circuits, it espouses *Levin* v. *Wear-Ever Aluminum Inc.*, 3 Cir., 427 F.2d 847, and *Pure Oil Co.* v. *Boyne*, 5 Cir., 370 F.2d 121, and, with apparently less assurance, *Superior Life Insurance Co.* v. *U. S.*, 4 Cir., 462 F.2d 945; *United States* v. *Evans*, 10 Cir., 365 F.2d 95; and, *Hamilton* v. *Nakai*, 9 Cir., 453 F.2d 152.

Levin v. *Wear-Ever Aluminum, Inc.*, 3 Cir., 427 F.2d 847, is a more complicated matter than that before the Court. First, the order as to the dismissal of Wear-Ever Aluminum, Inc. was one to be entered under Rule 58(b) of the Federal Rules of Civil Procedure, and thus must be approved by the Judge personally, which is not the situation here. From what appears in this case, the motions to dismiss only went to the granting of the motion to dismiss Wear-Ever. It does not appear that Kennedy, the co-defendant, challenged the entry of the jury verdict, and judgment thereon, by the Clerk as to that portion of the

case. In other words, as here, both the defendant Kennedy and the plaintiff Levin appear to have been of the feeling that the ministerial entry of the judgment by the Clerk had been done. Further, from the time of the verdict until the conclusion of the matter of appeal was a scant five months, including the necessary motions, argument and determination. It should also be noted that the entry in the docket required under Rule 79(a) had not been performed, though it was performed in this cause.

In *Pure Oil Co.* v. *Boyne,* 5 Cir., 370 F.2d 121, the Court denied motion to amend its findings on December 18, 1964. On February 11th it entered its formal decree relating to its activity of December 18th. This demonstrates the understanding of the trial judge that he had not concluded the litigation. Again, the time lapse was less than two months. Again, in *Superior Life Insurance Co.* v. *United States,* 4 Cir., 462 F.2d 945, after the entry of the Court's Findings of Fact and Conclusions of Law, there was an express direction by the Court to the party to prepare a formal judgment order. There was express understandings of both parties that the formal judgment order was to be submitted, and the two month interval between the Court's direction and the entry of the order appears to have been taken at the most part with verifying the amounts due in that Internal Revenue case. That the intent and understanding of the parties is a material consideration, as it was duly considered by the Court below, becomes evident from the *Superior Life* case:

> " . . . the conduct of the parties subsequent to the February 9 decision indicates that it was their clear understanding also that the district judge expected a separate formal judgment to be entered. Finally, the

> form of the order itself indicates that it was not intended by the district judge to be his final act." *Superior Life Insurance Co.* v. *U. S.*, 462 F.2d 945, 947.

United States v. *Evans*, 10 Cir., 365 F.2d 95, emphasizes the importance of the Court's understanding of finality. It demonstrated that the trial judge continued to take decisive action even after his act proposing to be a judgment had concluded.

Again, in *Hamilton* v. *Nakai*, 9 Cir., 453 F.2d 152, the understanding of the parties was paramount, that Court holding:

> "We have no doubt that the court, the parties, and the clerk considered the August 3, 1970, order as final. There is no reason to subject the parties to further expense and delay by requiring them to return to the District Court to have a new order entered." *Hamilton* v. *Nakai*, 453 F.2d 152, 155.

2. It is the argument of the Government that the 1963 amendment to Rule 58 was designed to eliminate uncertainty as to when a final appealable order had been entered. No uncertainty existed here as to the parties or the Courts because of the Clerk's oversight. It would be inconceivable that the Government floundered for two years and three months in an attitude of uncertainty, nor does it suggest any such situation. The argument of the Court seems to be directly contrary to the rational of the many of this Court's decisions. In *Commissioner of Internal Revenue* v. *Bedford's Estate*, 325 U.S. 283, this Court stated a relation to whether a Circuit practice of entering "orders for mandate" conformed to the spirit of expeditious litigation, and said:

> "In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek

> further review. So long a period ought not to be extended by delay in entering a judgment nor should the burden of securing such entry be put upon the successful litigant." *C. I. R.* v. *Bedford's Estate*, 325 U.S. 283, 288.

This Court, again, in *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, warned against highly technical interpretations of rules, stating:

> "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Brown Shoe Co. v. U. S.*, 307 U.S. 294, 306.

Following this pragmatic approach, the Tenth Circuit in *Carey, Baxter & Kennedy, Inc.* v. *Wilshire Oil Co. of Texas*, 346 F.2d 110, faced with a problem similar to that before the Court, stated:

> There is also a procedural issue which must be determined. Wilshire has moved to dismiss the appeal on the ground that the judgment of the trial court is not in the record. The written findings and conclusions are before us. Wilshire contends however, that the clerk's entry of judgment is not in the record and hence there is no assurance that it was ever entered; that there is not a judgment to review. This motion is without merit. It is the duty of the clerk to enter the judgment on the civil docket. See Rules 58 and 79(a), Federal Rules of Civil Procedure. It must be presumed that the clerk performed this duty and Wilshire does not seriously question this. Nor is the finality of the court's order denying the intervention questioned. The contention thus reduces to a most technical one which does not merit attention. It would be indeed impractical to dismiss or even stay this appeal so as to obtain the showing demanded. We conclude

that the findings and conclusions furnish the requisite evidence of the judgment appealed from so as to render unnecessary the final entry. *Carey, Baxter & Kennedy, Inc.* v. *Wilshire Oil Co. of Texas,* 346 F.2d 110, 112.

3. and 4. The Government has sought to invoke this Court's supervisory powers to save the confused litigants of the Seventh Circuit from the sea of uncertainty into which this decision has cast it. We suggest its fears are exaggerated, to say the least. We suggest the Government had no uncertainty when on July 9, 1970, two years before the present issue was made, it filed its Notice of Appeal [against Harry H. Foiles] from the judgment here concerned. We suggest but will not guarantee, that a similar situation is unlikely to arise for the application of this decision, the facts in this matter being so singular. We suggest that the Government's proposition to this Court of a hypertechnical application subverts the very intent of Rule 58, which professed to be "designed to encourage all reasonable speed . . . "

CONCLUSION

Wherefore, for the above and foregoing reasons, we respectfully submit that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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